PP

v.

BALA MATIK

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
SITI NORMA YAAKOB CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
[CRIMINAL APPEAL NO: 05-61-2002(Q)]
20 MAY 2005

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Respondent appealed to Court of Appeal after being found guilty by High Court - Court of Appeal ordered a retrial - Appeal and cross-appeal by public prosecutor and respondent respectively against decision of Court of Appeal - Whether Court of Appeal had acted erroneously*

CRIMINAL PROCEDURE: *Appeal - Grounds of - Respondent appealed to Court of Appeal after being found guilty of murder by High Court - Court of Appeal ordered a retrial - Appeal and cross-appeal by public prosecutor and respondent respectively against decision of Court of Appeal - Whether Court of Appeal had acted erroneously*

The respondent had been found guilty on two charges of murder under s. 302 of the Penal Code and sentenced to death by the High Court. He appealed to the Court of Appeal, which allowed the appeal and ordered a retrial on the following grounds: (i) there were two convictions for murder but only one sentence passed; and (ii) whether the sentence passed was for the conviction on the first or second murder charge. The public prosecutor and the respondent respectively appealed and cross-appealed against this decision. They both agreed that the Court of Appeal had acted in error when it ordered a retrial especially when the merits had been argued but not dealt with by the Court of Appeal in its judgment.

The prosecution contended that: (a) the comment by the Court of Appeal that the proper course was to proceed on one of the charges and leave the other murder charge in the court file was certainly an error as it was contrary to the established principles of law and practice; and (b) the sentence of death imposed by the High Court judge on the respondent was in respect of both the murder charges and that it was, therefore, wrong for the Court of Appeal to hold that there were two convictions for murder but only one sentence

passed. The respondent, however, submitted that since the appeal had been allowed, he should have been acquitted and discharged since it would be unfair to subject him to another trial.

Held (allowing the public prosecutor's appeal and dismissing the respondent's cross-appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1] After considering the arguments of both parties, this court was of the unanimous view that the Court of Appeal was certainly in error when it ordered a retrial on the grounds stated in its very brief two-page judgment. It was most unfortunate that the merits argued before it had not been discussed in that judgment. It would appear that the Court of Appeal had taken a very cursory view of things despite the seriousness of the murder charges. The public prosecutor's appeal should be allowed and the cross-appeal dismissed. The matter was to be remitted back to the Court of Appeal to be reheard on its merits as two of the three judges in the earlier panel had retired. The Court of Appeal was also to expedite the hearing of the respondent's appeal. (pp 100 h & 101 a)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnote*

Responden telah didapati bersalah ke atas dua tuduhan membunuh di bawah s. 302 Kanun Keseksaan dan dihukum mati oleh Mahkamah Tinggi. Beliau merayu kepada Mahkamah Rayuan, yang telah membenarkan rayuan tersebut dan memerintahkan satu perbicaraan semula atas alasan-alasan berikut: (i) terdapat dua sabitan atas tuduhan membunuh tetapi hanya satu hukuman dijatuhkan; dan (ii) sama ada hukuman yang dijatuhkan adalah untuk sabitan atas tuduhan membunuh pertama atau kedua. Pendakwa raya dan responden masing-masing telah merayu dan merayu balas terhadap keputusan tersebut. Kedua-duanya bersetuju bahawa Mahkamah Rayuan telah melakukan kesilapan apabila memerintahkan satu perbicaraan semula terutama sekali apabila merit-merit kes telah dihujahkan tetapi tidak ditangani oleh Mahkamah Rayuan di dalam penghakimannya.

Pihak pendakwa berhujah bahawa: (a) komen Mahkamah Rayuan bahawa jalan yang betul adalah untuk meneruskan dengan salah satu tuduhan tersebut dan membiarkan tuduhan yang satu lagi berada di fail mahkamah adalah satu kesilapan kerana ia bertentangan dengan prinsip-prinsip mantap undang-undang dan amalan; dan (b) hukuman mati yang dijatuhkan oleh hakim Mahkamah Tinggi terhadap responden adalah berkaitan dengan kedua-dua tuduhan membunuh dan, oleh itu, adalah salah bagi Mahkamah Rayuan memutuskan

bahawa ada dua sabitan membunuh tetapi hanya satu hukuman yang diluluskan. Responden, bagaimanapun, menghujah bahawa oleh kerana rayuan tersebut telah dibenarkan, beliau sepatutnya dibebaskan dan dilepaskan memandangkan bahawa ia tidak adil untuk membiarkan beliau melalui satu lagi perbicaraan.

Diputuskan (membenarkan rayuan pendakwa raya dan menolak rayuan balas responden)
Oleh Abdul Malek Ahmad PMR menyampaikan penghakiman mahkamah:

[1] Setelah memberikan pertimbangan kepada hujahan-hujahan kedua-dua pihak, mahkamah ini sebulat suara berpendapat bahawa Mahkamah Rayuan telah silap apabila ia memerintahkan satu perbicaraan semula atas alasan-alasan yang disebut di dalam penghakiman ringkas dua halamannya. Adalah sungguh malang bahawa merit-merit yang dihujahkan di hadapan mahkamah tersebut tidak dibincangkan di dalam penghakimannya. Mahkamah Rayuan nampaknya telah mengambil pandangan sepintas lalu terhadap perkara-perkara sedemikian walaupun dengan kewujudan tuduhan-tuduhan membunuh yang serius tersebut. Rayuan pendakwa raya patut dibenarkan dan rayuan balas ditolak. Halperkara ini akan diremit kembali ke Mahkamah Rayuan untuk dibicara semula di atas merit kerana dua dari tiga panel hakim dahulu telah pun bersara. Mahkamah Rayuan juga harus mempercepatkan perbicaraan rayuan responden.

Diperintah sedemikian.]

Case(s) referred to:
Jaafar Hussain v. PP [1950] 16 MLJ 154 ***(refd)***
Lim Sing Hiaw v. PP [1965] 31 MLJ 85 ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***
PP v. Ooi Lean Chai [1990] 2 CLJ 656; [1990] 2 CLJ 798 HC ***(refd)***
Tan Boon Hock v. PP [1979] 1 MLJ 236 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 164, 165(1), 399(i)

For the appellant - Wong Chiang Kiat DPP
For the respondent - Lau Hui Kui; M/s HK Lau & Co

[Appeal from Court of Appeal, Miri; Criminal Appeal No: Q-05-43-1998]

Reported by Suresh Nathan

JUDGMENT

Abdul Malek Ahmad PCA:

The respondent was charged as follows:

> **First Charge**
>
> That you, on or about the 10th day of April, 1997 at about 10.30 p.m. at Sungai Maaw Road, Sibu in the State of Sarawak, committed murder by causing the death of Joka Purnomo and that you thereby committed an offence punishable under section 302 of the Penal Code (F.M.S. Cap. 45).
>
> **Second Charge**
>
> That you, on or about the 10th April, 1997 at about 10.30 p.m. at Sungai Maaw Road, Sibu in the State of Sarawak, committed murder by causing the death of Ahmad Nuryani (m) and that you thereby committed an offence punishable under section 302 of the Penal Code (F.M.S. Cap. 45).

The learned High Court Judge called for the defence at the close of the prosecution case on both charges and the respondent elected to give evidence on oath. He was found guilty on both charges and convicted and the learned High Court Judge (Tee Ah Sing, J), at pp. 233 and 234 in the second volume of the record of appeal, said:

> **Court:**
>
> This court has found the accused guilty of the 1st charge and the 2nd charge. It is now my duty to pass sentence upon you the accused. The only sentence in law for these two offences is sentence of death. It is that you be taken from this place to a lawful prison and thence to a place of execution and that you be hanged by the neck until you are dead.

The respondent appealed to the Court of Appeal and in a somewhat brief judgment, the Court of Appeal (Denis Ong Jiew Fook, Mohd Saari Yusoff and Mohd Noor Ahmad JJCA), in ordering a retrial, pronounced:

> We are unanimous in our decision that this appeal be allowed and that a retrial is ordered. It will be for the Public Prosecutor to decide if they wish to proceed with the retrial. In our view if the retrial proceeds the proper course is to proceed on one of the charges and leave the other murder charge in the court file. It will be open to the Public Prosecutor to proceed with the other charge if it were reminded to do so subsequently. All Exhibits to remain pending retrial.

> The reason for ordering a retrial in this case is that there are two convictions for murder and only one sentence is passed. Further, we are unsure as to whether the sentence passed was for the conviction on the first murder charge or the second murder charge. On the other hand, it makes no sense to pass a second sentence of death after the first sentence of death is carried out.

Both the public prosecutor and the respondent have respectively appealed and cross appealed to this court and before us both parties agreed that the Court of Appeal acted in error when it ordered a retrial especially when the merits had been argued but were not dealt with by the Court of Appeal in its judgment.

The learned deputy agreed that upon perusal of the grounds of judgment of the Court of Appeal, there was no finding whatsoever which could impute any infirmities in the decision of the learned High Court Judge as regards the conviction of the respondent on the two counts of murder. What, then, was the purpose of ordering a retrial?

He reiterated that ordering a retrial was a discretion to be exercised only in appropriate situations as stated by this court in *Tan Boon Hock v. Public Prosecutor* [1979] 1 MLJ 236 where it held that the power of an appellate court to order a retrial on a proper charge before another Magistrate when it is of the opinion that an accused person was convicted on a wrong charge is discretionary. In that case, since it was held that there was no proper charge, ordering a retrial was most appropriate and the learned judge had exercised his discretion properly.

Similarly, in *Ooi Lean Chai v. Public Prosecutor* [1991] 2 MLJ 552, the accused had originally been convicted on a charge of trafficking in heroin and 6-monoacetylmorphine (see [1990] 2 CLJ 656). At the original trial, the chemist's report had been duly served on the accused but the Supreme Court allowed his appeal against conviction on the ground that the chemist's report was incorrect in stating that 6-monoacetylmorphine was a dangerous drug, as in fact it was not so listed at that time. The Supreme Court ordered a retrial. At the retrial, the accused was charged only for trafficking in heroin. The prosecution relied on the same chemist's report but this had not been re-served on the accused. The chemist was not called to give evidence at the retrial. The accused was convicted (see [1999] 1 MLJ 189) and he appealed against his conviction.

It was held that a retrial means a new or fresh trial. The retrial could not be treated as a continuation of the first vitiated trial and whatever was done by the prosecution during the earlier trial towards proving the essential ingredients of the charge, such as the service of the notice under s. 399(i) of the Criminal Procedure Code, must be ignored as non-existent and of no effect.

The learned Deputy argued that the order for a retrial here by the Court of Appeal was exercised not judiciously but in a capricious and arbitrary manner as there was no defect whatsoever in the trial conducted by the learned trial judge. This, he emphasised, had occasioned a failure of justice.

Sections 163, 164 and 165(1) of the Criminal Procedure Code which provides respectively that there can be separate charges for distinct offences, that three offences of the same kind within twelve months may be charged together, and if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, that person may be charged with and tried at one trial for any such offence. The combined effect of the three sections, according to the learned deputy, was that the respondent had been properly charged and tried in one trial for the two murder charges committed at around the same time.

Thomson, LP, in dealing with the joinder of charges in *Lim Sing Hiaw v. Public Prosecutor* [1965] 31 MLJ 85 said at p. 88 that:

> Then it was said that the two charges should not have been tried together. Now, there is nothing in the Criminal Procedure Code which prevented the charges being tried together because the alleged acts were clearly part of the same transaction and the case therefore fell within section 165(i) of the Code …
>
> In the present case we can see nothing in the way of injustice or possible miscarriage of justice that could possibly be attributed to the trial of the two charges together and would justify us in interfering with the way in which Azmi J exercised his discretion in refraining to order separate trials.

Much earlier, William, CJ in *Jaafar bin Hussain v. Public Prosecutor* [1950] 16 MLJ 154 had occasion to deal with s. 165(1) of the Criminal Procedure Code and it is relevant to reproduce what he said at pp. 155 and 156:

> There have been, and there will continue to be, cases in which the accused person is arrested and found to be carrying, or to be in possession of, both arms and ammunition. In such cases the prosecution can either (a) use sub-section (i) of section 165 of the Criminal Procedure Code by charging the accused with both offences and trying them together at one trial, or, (b) apply to stay one charge and proceed only on the other charge. For reasons which are set out later in this judgment we think the former course is generally preferable.

We think that the reluctance to use sub-section (i) of section 165 of the Criminal Procedure Code arises from the view – an erroneous view – that in no circumstances should two capital cases be tried together.

In *R. v. Jones* 13 Cr. App. R. 86 where a count for robbery with violence was joined with a count for murder in the same indictment, the Court of Criminal Appeal said: "A trial for murder is too serious and complicated to have such counts inserted." It should be noted that the phrase is "too serious and complicated" and not too serious or complicated.

In a later case of *R. v. Davis* 26 Cr. App. R. 95 the appellant was convicted of two murders at one and the same trial. On appeal the appellant relied on the case of *R. v. Jones, supra,* but the Court of Criminal Appeal, in dismissing the appeal, said:

> In our opinion it is not accurate to say that the joinder of the two counts in this case is fatal, and indeed, when one looks at the facts of the two charges, it is apparent that together they may well be regarded as substantially one transaction.

Although that Court of Criminal Appeal went on to say that the joinder of two murders in one indictment is undesirable they also said that the matter is one for judicial discretion.

Carrying or being in possession of arms, and carrying or being in possession of ammunition, are offences both of which carry a mandatory death penalty. But, when an accused is found with a firearm and ammunition on his person, at one and the same time, the facts cannot be said to be complicated. To use the words set out in the passage quoted from *R. v. Davis, supra:*

> when one looks at the facts of the two charges, it is apparent that together they may well be regarded as substantially one transaction.

That brings us to the words "the same transaction" in sub-section (i) of section 165 of the Criminal Procedure Code. That sub-section reads:

> If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

We agree with the following passage from the case of *Amrita Lal Hazra v. Emperor* ILR 42 Cal. 957 at p. 983:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

> If a person is found carrying arms and ammunition on his person, at one and the same time and place, he is found armed and there can be no doubt that there is continuity of action and community of a purpose or design. Accordingly he should be charged with both offences and tried at one and the same trial for both of them.
>
> If the prosecution take the second course and apply to stay the trial on one charge and proceed on the other, then, in such a case as we have described, we fail to see how it is possible to exclude the evidence touching the charge which has been stayed. The evidence touching it could only be excluded either by coaching the witnesses before the trial or by the prosecutor unduly leading them, both of which courses are objectionable. The two offences are so inseparably connected that the proof of one necessarily and inescapably involves proving the other, as it does in the case now before us. It is for these reasons we prefer that the accused should be tried at one trial for both offences.

The learned deputy maintained that in the light of the authorities, it is clear that the two charges faced by the respondent are so intrinsically connected together to render a separate trial to be a farce and would inevitably prejudice the respondent. The comment by the Court of Appeal that the proper course was to proceed on one of the charges and leave the other murder charge in the court file was certainly an error as it is contrary to the established principles of law and practice.

It is not disputed that the sentence of death imposed by the learned trial judge on the respondent was in respect of both the murder charges and it would look odd and repetitive for him to repeat the death sentence for the second murder conviction. It was therefore wrong for the Court of Appeal to hold that there are two convictions for murder but only one sentence is passed. There is also no reason for the Court of Appeal to say that there is some confusion as a result of this as both convictions carry the same death sentence.

Learned counsel for the respondent, in agreeing with the learned deputy that the Court of Appeal's order for a retrial was wrong, submitted that having allowed the appeal, the respondent should have been acquitted and discharged as it would be unfair to subject the respondent to another trial after the previous one. He had also regurgitated the facts pertaining to the murder charges.

After considering the arguments of both the learned deputy and the learned assigned counsel for the respondent, we were of the unanimous view that the Court of Appeal was certainly in error when it ordered a retrial on the grounds stated in its very brief two page judgment. It was most unfortunate that the merits argued before it were not discussed in that judgment. It would appear that they had taken a very cursory view of things despite the seriousness of the murder charges.

We were unanimous that the appeal should be allowed and the cross appeal dismissed. The matter is remitted back to the Court of Appeal to be reheard on the merits as two of the three judges in the earlier panel had retired. We would also order that the Court of Appeal expedite the rehearing of the appeal.